Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN P. REIDY and wife, TERRY L. REIDY,

Petitioners,

v.

WHITEHART ASSOCIATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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January 9, 2008

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QUESTIONS PRESENTED

Petitioners are homeowners in a planned community created by a declaration of covenants and restrictions. Respondent is the homeowners' association created pursuant to the declaration. On August 31, 2005, Respondent sent a letter to Petitioners giving notice that fines had been proposed against them for violations of the declaration and that a hearing before Respondent's Board would be held where they could "give reason, if any, why this fine should not be levied against you." The hearing was held. No evidence was presented to Respondent's Board concerning any violation; however, acting solely under the statutory authority of the North Carolina Planned Community Act, it proceeded to impose a fine of $25.00 per day, which the courts later enforced. The questions presented are:

1. Whether Respondent, because its power to impose and enforce fines is solely derived from the North Carolina Planned Community Act, was engaged in "state action" for procedural due process purposes?

2. Whether Respondent, in exercising its adjudicatory function and imposing fines, provided the procedural due process required by the Fourteenth Amendment, given all of the circumstances of this case, including its strong pecuniary interest in the outcome?

3. Whether retroactive application of the North Carolina Planned Community Act, to give associations formed prior to its enactment the power to impose fines for violations of subdivision declarations, violates the Contract Clause?

PARTIES TO THE PROCEEDING

The petitioners in this case are John P. Reidy and wife, Terri L. Reidy.

The respondent is Whitehart Association, Inc.

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PETITION FOR A WRIT OF CERTIORARI

John P. Reidy and wife, Terri L. Reidy, respectfully petition for a writ of certiorari to review an Order of the Supreme Court of North Carolina, which, by dismissing Petitioners' appeal and denying discretionary review, made final an opinion of the Court of Appeals of North Carolina (hereinafter "the Court of Appeals").

OPINIONS BELOW

The Order of the Supreme Court of North Carolina, dismissing Petitioners' appeal and denying Petitioners' petition for discretionary review (App. 1a-3a) is reported at 652 S.E. 651 (Mem) (2007). The opinion of the Court of Appeals, on the merits (App. 4a-16a), is reported at 648 S.E.2d 265 (2007). The decisions of the Wake County Superior Court (hereinafter "the Superior Court") (App. 17a-23a), granting summary judgment in favor of Respondent, are unreported.

JURISDICTION

The opinion of the Court of Appeals was entered on August 7, 2007 (App. 4a-16a). The Constitutional issues raised by Petitioners, and addressed in the Court of Appeals' opinion, were the subject of a Notice of Appeal, and an alternative Petition for Discretionary Review, to the Supreme Court of North Carolina. The Order of the Supreme Court of North Carolina, entered October 11, 2007 (App. 1a-3a), dismissing Petitioners' appeal, and denying Petitioners' Petition for Discretionary Review, is a final judgment rendered by the highest

court of the State. This Petition For A Writ Of Certiorari is filed within ninety (90) days of that Order, and this Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution, provides, in pertinent part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, § 10 of the United States Constitution provides, in pertinent part, as follows:

> "No State shall . . pass any . . Law Impairing the Obligations of Contracts . . ."

This case also involves N.C.G.S. § 47F-1-102; N.C.G.S. § 47F-3-102 and N.C.G.S. § 47F-3-107.1. These statutes are reprinted, in pertinent part, in Appendix G (App. 32a-38a).

STATEMENT OF THE CASE

1. **Factual Background.** On October 2, 1997, H.M. Enterprises – Whitehart Limited Partnership filed a declaration of covenants ("the Whitehart Declaration") with the Wake County Registry of Deeds, with respect to property that it both owned and wished to develop. The Whitehart Declaration contains no pro-

vision providing for the imposition of fines on homeowners for violations of its provisions, and has never been amended to provide for the same.

On January 1, 1999 ("the Effective Date"), the North Carolina Planned Community Act ("the NCPCA") became effective in North Carolina. The NCPCA contained provisions enabling homeowners' associations to impose "after notice and an opportunity to be heard" reasonable fines for violations of subdivision declarations of covenants. N.C.G.S. § 47F-3-102(12).

The NCPCA, specifically N.C.G.S. § 47F-1-102(c), provided that homeowners' associations formed prior to the Effective Date were automatically provided with the power to impose fines under the procedures described therein. However, the Supreme Court of North Carolina looked at other language in the NCPCA and held that, in spite of that provision, homeowners' associations formed prior to the Effective Date could only impose fines under the procedures provided for in the NCPCA if the subdivision declaration specifically permitted the same. *Wise v. Harrington Grove Community Association, Inc.*, 357 N.C. 396, 403, 584 S.E.2d 731, 737 (2003).

On July 16, 1999, Petitioners purchased a home on a lot subject to the Whitehart Declaration. On that date the law in North Carolina, as explained in *Wise v. Harrington Grove,* was that homeowners' associations formed prior to January 1, 1999 only had the power to impose fines, for alleged violations of the community declarations, if the declaration of covenants governing the community specifically gave the homeowners' association that power. The Whitehart Declaration did not provide, and does not provide, for the imposition

of fines on homeowners who allegedly violate its provisions.

On December 8, 2000, Respondent was formed. Respondent exercises the powers given to the homeowners' association described in the Whitehart Declaration.

In response to the decision in *Wise v. Harrington Grove*, the North Carolina General Assembly passed Session Law 2004-109, with an effective date of July 17, 2004. (App. 35a, 37a). S.L. 2004-109 provided for modification of the language, in N.C.G.S. § 47F-1-102 and N.C.G.S. §47F-3-102, that the Supreme Court of North Carolina had relied upon in *Wise v. Harrington Grove*. More specifically, S.L. 2004-109 provided that homeowners associations formed prior to the Effective Date were entitled to fine homeowners for violations of subdivision declarations "unless the articles of incorporation or the declaration expressly provides to the contrary." (App. 35a, 37a). S.L. 2004-109 was specifically passed to overturn the result of *Wise v. Harrington Grove* and permit all homeowners' associations formed prior to the Effective Date to impose fines for alleged violations of subdivision declarations. (App. 29a-31a).

On or about August 31, 2005, Petitioners received a letter from the Respondent ("the Letter") concerning alleged violations of the Whitehart Declaration (App. 23a-28a). The Letter gave Petitioners notice that Respondent had instituted a fine policy for "violations of the Association's legal documents," and that "a fine of $25.00 per day has been proposed against you for every day" that violations of the "Whitehart covenants" existed. (App. 25a, 28a). Although Petitioners' liability had, as stated in the Letter, been predetermined, Petitioners were given the opportunity to be present at a

meeting of Respondent's Board to "give reason, if any, why this fine should not be levied against you." (App. 25a, 28a).

On October 27, 2005, a meeting of Respondent's Board was held, as provided or in the Letter. (App. 25a). At the meeting, as Respondent had predetermined liability, no evidence was presented in any form, by anyone, concerning any alleged violation of the Whitehart Declaration. (App. 25a). Thus, Petitioners did not have the opportunity to listen to evidence concerning the alleged violations of the Whitehart Declaration; or to cross examine witnesses concerning the same. (App. 25a-26a). Petitioners were given the opportunity to make a presentation with respect to the punishment to be imposed for their predetermined liability, and Petitioners used that opportunity to present arguments concerning the powers of Respondent. (App. 26a). Petitioners did not concede any violation of the Whitehart Declaration, and Petitioners contended that there was no violation of the Whitehart Declaration. (App. 26a).

On October 28, 2005, Respondent sent a letter to Petitioners, informing them of Respondent's decision, which was that a fine in an unspecified amount would be immediately imposed. Respondent subsequently filed a claim of lien on Petitioners' home, to secure payment of the fines.

2. **Proceedings In the Superior Court.** On October 31, 2005, Petitioners commenced an action in the Superior Court of Wake County, North Carolina. Petitioners sought, among other things, a declaratory judgment that the NCPCA did not, in spite of its terms, apply retroactively to modify the contract between

the parties embodied in the Whitehart Declaration, because retroactive modification would be in violation of the Contract Clause, United States Constitution, Article I, § 10; and a declaratory judgment that the procedure used by Respondent in imposing fines violated Petitioners' procedural due process rights protected by the Fourteenth Amendment to the United States Constitution.

Respondent, by counterclaim, alleged that Petitioners violated the Whitehart Declaration and sought injunctive relief (removal of stairs built in alleged violation of the Whitehart Declaration), judgment for the fines imposed by Respondent subsequent to the meeting held on October 27, 2005, and enforcement of the claim of lien which Respondent filed to secure payment of the fines.

On February 28, 2006, the Superior Court entered an Order Granting Defendant's Cross Motion For Summary Judgment And Denying Plaintiff's Motion For Summary Judgment And Order Continuing Hearing. (App. 20a-22a). On June 19, 2006, the Superior Court entered an Order Granting Whitehart's Motion For Summary Judgment And Mandatory Injunction And Order Denying Plaintiff's Motion For Summary Judgment. (App. 17a-19a). Pursuant to the terms of these orders, all of Petitioners' claims were dismissed, and judgment was entered in favor of Respondent. Petitioners properly perfected an appeal to the Court of Appeals.

3. The Court of Appeals' Opinion. The Court of Appeals upheld the orders of the Superior Court (App. 4a-16a). With respect to Petitioners' argument that retroactive application of the NCPCA, by substantially modifying the contract between the parties embodied in the Whitehart Declaration, violated the Contract Clause, the

Court of Appeals noted that "the legislature of a state may at any time modify the remedy, even taken away a common law remedy altogether, without substituting any in its place, if another efficient remedy remains, without impairing the obligation of contract." (App. 11a-12a). The Court of Appeals held that, because the NCPCA provision allowing for fines to be imposed did not disturb a vested right, or create a new obligation, and merely provided an additional remedy for enforcement of the Whitehart Declaration, it did not violate the Contract Clause. (App. 12a).

With respect to Petitioners' argument that Respondent's imposition of fines was a "state action" for procedural due process purposes, and that the "show cause" procedure provided did not comport with the due process requirements of the Fourteenth Amendment, the Court of Appeals questioned, without deciding the issue, Petitioners' assertion that Respondent's imposition of fines was a "state action"; and went on to hold that the procedure provided by Respondent was adequate for procedural due process purposes. (App. 14a-15a).

REASONS FOR GRANTING THE PETITION

I.

THE PROCEDURE UTILIZED BY RESPONDENT TO IMPOSE FINES AGAINST PETITIONERS VIOLATES THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A homeowners' association is a legal entity generally created by a real estate developer in conjunction with subdividing and developing land for residential home construction. The homeowners' association derives its

authority from a declaration of covenants, conditions and restrictions, or similar document, that is recorded by the initial landowner prior to conveyance of lots in the development; and is created for a variety of purposes in connection with the development, including owning and maintaining common amenities such as swimming pools and parks; and common infrastructure such as roads and stormwater detention ponds; and for enforcing any restrictions on the use of land within the development described in the declaration.

Homeowners' associations have a long history,[1] although their use in development did not really begin to take off until publication of the Homes Association Handbook by the Urban Land Institute in 1962. By 1970, approximately 701,000 housing units were within association governed communities, a number that had risen to 3.6 million by 1980.[2] Throughout that early period, homeowners' associations derived their powers from state common law governing enforcement of covenants which "run with the land". As a result, development of the law proceeded on a piecemeal basis.[3]

On February 9, 1981, the American Bar Association approved the Uniform Planned Community Act ("the

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[1] An excellent history of homeowners' associations in the United States is Evan McKenzie, Privatopia: *Homeowners Associations and the Rise of Residential Private Government* (Yale Univ. Press 1994).

[2] Community Associations Institute ("CAI"), Industry Data (www.caionline.org/about/facts.cfin) (last visited 12/30/07).

[3] *See* the Prefatory Note to the Uniform Planned Community Act, approved by the American Bar Association on February 9, 1981. *See also*, 2 Websters Real Estate Law in North Carolina, at 1230 (Lexis Law Publishing, 1999).

UPCA"), drafted by the National Conference of Commissioners on Uniform State Laws. (App. 39a-40a). The UPCA was specifically developed to provide a uniform approach to planned community development, and to replace the piecemeal common law regime with a statutory regime for homeowners' association operation.

Section 3-102 of the UPCA contains a list of powers that could be exercised by homeowners' associations subject to its provisions, including, for instance, the power to adopt and amend budgets, hire and discharge managing agents, engage in litigation, make improvements, and impose assessments on the homeowners subject to the declaration for the community. Of particular relevance with respect to this petition, homeowners' associations were given the power to "levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association." UPCA § 3-102(a)-(11). (App. 40a). This power to levy fines was not generally available to homeowners' associations under the common law; who, instead, had been forced to seek, in connection with violations of community declarations, injunctive or other relief from the Courts.

The UPCA is very similar to the Uniform Condominium Act (UCA), also drafted by the National Conference of Commissioners on Uniform State Laws, and approved by the American Bar Association on February 14, 1978. Of relevance to Petitioners' argument as to why certification should be issued, the section in the UCA which gives condominium associations the power to impose fines for declaration violations; UCA § 3-102-(11), is identical to UPCA § 3-102(11).

In jurisdictions such as North Carolina, where the UPCA was adopted, and in jurisdictions where the UCA

was adopted or community associations were otherwise given, by statute, the power to impose fines, statutory provision for associations to impose fines marked a fundamental shift in the balance of power between the individual homeowners in a community, and the members of the Board which controlled the association. *See, Wise v. Harrington Grove Community Association, Inc.*, 357 N.C. 396, 402, 584 S.E.2d 731, 736 (2003), *citing*, 2 *Websters Real Estate Law*, § 30A-1, at 1231.

Currently, the majority of States have adopted either the UPCA or the UCA (or both), and associations are empowered by statute to impose fines. *See*, Ala. Code § 35-8A-302(a)(11) (Alabama); AK ST § 34.08.320-(a)(11) (Alaska); A.R.S. § 33-1242(A)(11) (Arizona); C.R.S.A. § 38.33.3-302(1)(k) (Colorado); C.G.S.A. § 47-244(a)(11) (Connecticut); DC ST § 42-1903.08 (District of Columbia); F.S.A. § 720.305(2) (Florida); HRS § 514B-104(a)(11) (Hawaii); 765 ILCS 605/ 18.4(l) (Illinois); LSA-R.S. 9:1123.102(11) (Louisiana); 33 M.R.S.A. § 1603-102 (Maine); MD Code, Real Property, § 11-109(d)(16) (Maryland); M.G.L.A. 183A § 10(b)(5) (Massachusetts); M.S.A. 515A.3-102(a)(11) and M.S.A. § 515B.3-102(a)(11) (Minnesota); V.A.M.S. 448.3-102(1)(11) (Missouri); Neb.Rev.St. § 76-860(a)-(11) (Nebraska); N.R.S. 116.3102(l)(m) (Nevada); N.J.S.A. 46:8B-13(d) and N.J.S.A. 46:8B-14(c) and N.J.S.A. 46:8B-15(f) (New Jersey); NM ST § 47-7C-2(A)(11) (New Mexico); N.C.G.S. § 47C-3-102(a)(11) and N.C.G.S. § 47F-3-102(a)(11) (North Carolina); O.R.S. § 94.630(l)(n) and O.R.S. § 100.405(4)(k) (Oregon); 68 Pa.C.S.A. § 3302(a)(11) and 68 Pa.C.S.A. § 5302(a)(11) (Pennsylvania); Gen.Laws.R.I. 1956, § 34-36.1-3.02(a)(11) (Rhode Island); 27A V.S.A. § 3-102(a)-(11) (Vermont); RCWA 64.34.304(1)(l) and RCWA

64.38.020(11) (Washington); and W. Va. Code § 363-3-102(a)(11) (West Virginia). Almost without exception, the statutes simply grant the association the power to impose fines after "notice and opportunity to be heard", and leave it up to the association to determine what due process will be given.

The issue in this case, which involves what due process a homeowners' association must provide in proceedings where homeowners associations are empowered by statute to impose fines for violations of subdivision declarations, has apparently never been directly addressed. It is an issue of obvious importance to the millions of Americans who now live in association governed communities in the many jurisdictions where the community association or homeowners' association is empowered by statute to impose fines. (As of 2006, 57.0 million Americans lived in 23.1 million housing units in association governed communities.[4])

It is critically important that this Court address the issue and provide guidance as to the due process applicable in cases such as this one because the UPCA and UCA (generally adopted without relevant modification) both provide for hearings before community association boards, which are hardly impartial tribunals given that the association collects the fines imposed. With no real direction as to the due process to be given; with a strong pecuniary interest in finding a violation and imposing fines; and with no real judicial review of the community association boards' findings, the possibilities for abuse are obvious.

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[4]CAI, Industry Data (www.caionline.org/about/facts.cfin) (last visited 12/30/07).

If the Petition For A Writ Of Certiorari is granted, and Petitioner is permitted to submit a brief on the merits, Petitioners will argue (1) that the actions of Respondent, in imposing fines under the statutory authority provided by the NCPCA, is engaged in "state action" and (2) that the procedure provided in this case did not comply with the due process requirements of the Fourteenth Amendment. The general substance of the argument that Petitioners would make is as follows:

A. The Actions Of Respondent In Imposing Fines Upon Petitioners For Violation Of The Whitehart Declaration, In Filing A Lien To Secure Payment Of The Fines, And In Seeking Judicial Enforcement Of The Same Constitute "State Action" For Procedural Due Process Purposes.

The Fourteenth Amendment protects individuals from state action and not private action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930, 102 S.Ct. 2744, 2750 (1982). However, state action may be found where, although a private party takes the step that causes the harm, the State was sufficiently involved that it is appropriate to treat the conduct as a state action. *NCAA v. Tarkanian*, 488 U.S. 179, 192, 109 S.Ct. 454, 462 (1988).

State action in a due process analysis depends on the specific facts and circumstances surrounding the challenged action. The required nexus may be shown where "the State creates the legal framework governing the conduct", *Tarkanian*, 488 U.S. 179, 192, 109 S.Ct. 454, 462, 102 L.Ed.2d, 469, 485 (1988); or may be shown where "the private entity has exercised powers

that are 'traditionally the exclusive prerogative of the State.' " *Blum v. Yarketsky*, 457 U.S. 991, 1005, 102 S.Ct. 2777, 2786 (1982).

In this case, the State has established a statutory framework that allows Respondent to hold adjudicatory hearings at which it may impose fines that thereafter accrue on a daily basis, file a claim of lien to secure payment of the fines that it imposes, and enforce the claim of lien by suit. Misuse of the adjudicatory power to impose fines, possessed only by virtue of state law, and made possible only because Respondent is clothed with the authority of state law, is "state action," *See, Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 462 (1988). *See also, United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043 (1941). *See also, Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 929, 102 S.Ct. 2744, 2749-2750 (1982).

Further, the adjudicatory power given to homeowners' associations, permitting them to impose fines is traditionally an exclusive prerogative of the State. By allowing homeowners' association to conduct hearings and impose fines, without any judicial review as to whether the homeowner violated the declaration or the appropriateness of the fines imposed, the NCPCA is effectively a delegation to homeowners' associations of a power that has traditionally been the prerogative of the State, and actions taken by Respondent in the exercise of that delegated power are properly considered state action. *See, Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786 (1982).

Finally, Petitioners will argue that Respondent's actions are properly considered "state action" because of the manner in which the private deprivation of their due process rights have been enforced judicially. *See, Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948).

B. The Procedure Used By Respondent Did Not Provide Due Process Appropriate To The Nature Of The Case.

Procedural due process requires, at a minimum, that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-657 (1950). Unfortunately, the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Board of Curators v. Horowitz*, 435 U.S. 78, 86, 98 S.Ct. 948, 953 (1978). Instead, what is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure, its effect upon the rights asserted, and all other circumstances which may render the proceeding appropriate to the nature of the case. *Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599 (1944). Process which is a mere gesture is not due process. *Mullane*, 339 U.S. at 315, 70 S.Ct. at 657.

In considering what due process is appropriate in this case, and in similar cases, the Court should consider that Respondent has a substantial pecuniary interest in the outcome. In this case, Respondent imposed fines on Petitioners of $25.00 per day and secured a judgment from the Superior Court, against Petitioners, of $5,325.-00 (for fines accrued through the date of Judgment). (App. 19a).

Generally, due process entitles a person to a disinterested and impartial tribunal, a requirement that helps guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613 (1980). The require-

ment of an impartial tribunal preserves both the appearance and reality of fairness, "generating the feeling, so important to popular government, that justice has been done." *Id., citing, Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 649 (1951) (Frankfurther, J., concurring).

In this case, Respondents' Board was clearly not a disinterested and impartial tribunal, as is evidenced by the fact that it prejudged Petitioners' liability (App. 25a, 28a) and imposed fines without having heard any evidence concerning the alleged violations of the Whitehart Declaration. (App. 25a-28a). Further, even if the Respondent's Board suffered from no actual bias, and attempted to do its very best to weigh the scales of justice, the Board could not, as a matter of law, be a disinterested and impartial tribunal because Respondent is entitled to collect and use the fines imposed on Petitioners. This Court has previously reversed convictions rendered by the mayor of a town when the mayor's salary was paid in party by fees and costs levied by him while acting in his judicial capacity, noting that "(e)very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him to not hold the balance nice, clear and true" denies due process of law. *Turney v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927).

Because "justice must satisfy the appearance of justice", given Respondent's significant financial interest in the outcome, it is certainly questionable that due process could be satisfied, under any circumstances, by adjudication before Respondent. *See, Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243, 100 S.Ct. 1610, 1613-1614 (1980). At the very least, Respondent's

financial interest should be considered in determining what due process is appropriate.

Under the circumstances of this case, procedural due process requires: (1) that an initial evidentiary showing be made to Respondent's Board (or preferably, an adjudicatory panel thereof) that Petitioners have violated the Whitehart Declaration; (2) if witnesses present evidence to the Board, that they be sworn; (3) that Petitioners be given the opportunity to cross-examine any witnesses; (4) if any non-testimonial evidence is presented to the Board, that Petitioners have the opportunity to review the same; (5) that Petitioners be entitled to present evidence in response to evidence presented by Respondent; and (6) that the Board determine liability based upon evidence presented before considering the imposition of fines.

Respondent breached these minimum procedural due process obligations by determining liability prior to any hearing (and in fact by determining liability prior to giving notice) (App. 25a-28a); by finding liability based upon evidence presented outside the presence of Petitioners if any evidence was in fact presented to Respondent's Board, and by imposing fines without having determined liability based upon evidence presented at hearing. The due process provided by Respondent was a mere gesture, and not real due process at all.

II.

APPLICATION OF THE PROVISIONS OF THE NCPCA WHICH ALLOW HOMEOWNERS' ASSOCIATIONS TO IMPOSE FINES FOR VIOLATION OF SUBDIVISION DECLARATIONS, TO DECLARATIONS RECORDED PRIOR TO THE EFFECTIVE DATE, VIOLATES THE CONTRACT CLAUSE.

Petitioners contend that retroactive application of the provisions of the NCPCA which allow homeowners associations to impose fines for violation of subdivision declarations, to declarations recorded prior to the Effective Date, violates the Contract Clause. United States Constitution, Article I, § 10.

In determining whether a contractual right has been unconstitutionally impaired, this Court has developed a three-part test which is set forth in *U.S. Trust Co. Of N.Y. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). This test requires the court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.*

The first prong of the *U.S. Trust* test is obviously and easily met. In particular, the Whitehart Declaration is, under North Carolina law, a contract between the parties. *See, Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961). ("Restrictive covenants are contractual in nature, and create a species of incorporeal property right.")

With respect to the second prong of the *U.S. Trust* test, retroactive application of the NCPCA enlarges the remedies available to homeowners' associations

for alleged declaration breaches, substantially changing and impairing the contract between the parties. *See, Ogden v. Saunders*, 12 Wheat. 213, 25 U.S. 213, 256 (1827) (enlarging contractual remedies or obligations impairs a contract). *See also, Green v. Biddle*, 8 Wheat. 1, 21 U.S. 1, 36 (1823). (Imposing additional conditions in the contract of necessity impairs its obligation.) *See also, Bateman v. Sterrett*, 201 N.C. 59, 159 S.E. 14, 16 (1931); *citing, State v. Carew*, 13 Rich. (S.C.) 498 (1866) ("(A) law which enlarges, abridges, or in any manner changes the intentionof the parties, though professing only to regulate the remedy, necessarily impairs the obligation of the contract.")

More specifically, while Respondent could have, under the common law that existed at the time the Whitehart Declaration was filed, enforced its terms by filing a civil action seeking injunctive and other relief; now, using the powers retroactively given to it by the NCPCA, it was able to hold a hearing and impose fines which would accrue until Petitioners' alleged breach was remedied. Few homeowners, even with meritorious positions, can afford to litigate given the potential obligations to pay fines which rapidly accrue, and given that there is no real judicial review of an association's finding that its subdivision declaration was violated. (There does not appear to be any case concerning the standard of review by the courts of an association finding that the subdivision declaration had been violated. At best, it might be argued that the finding could be challenged in Court under a "no substantial evidence" standard.) The difference in the remedies available to Respondent as a result of the retroactive application of the NCPCA can not be more substantial

and fundamental; and obviously impair the contract between the parties.

With respect to the third prong of the *U.S. Trust* test, retroactive application, pursuant to N.C.G.S. § 47F-1-102(c) (App. 32a-36a), of N.C.G.S. § 47F-3-102(12) (App. 37a) and N.C.G.S. § 47F-3-107.1 (App. 38a), is both unreasonable, and unnecessary to serve an important public purpose. Retroactive application is unnecessary because the Whitehart Declaration provides a procedure by which it can be amended, and because the NCPCA itself provides that homeowners' associations, formed prior to January 1, 1999, may make the NCPCA applicable by amendment.

With respect to the NCPCA, it specifically provides, in N.C.G.S. § 47F-1-102(d) (App. 33a), as follows:

> (d) Any planned community created prior to the effective date of this Chapter may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or wtitten agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies.

Thus, if the lot owners subject to the Whitehart Declaration want the benefits of the N.C.G.S. § 47F-3-102(12) and § 47F-3-107.1, they may, pursuant to its terms or the provisions of N.C.G.S. § 47F-1-102(d), simply amend it to adopt the powers authorized by those provisions.

Because lot owners in a community created prior to the Effective Date may voluntarily amend their declara-

tions to adopt the NCPCA, it is unnecessary for the NCPCA to provide for the automatic retroactive application of N.C.G.S. § 47F-3-102(12) and § 47F-3-107.1. In fact, the NCPCA undoubtedly provides for retroactive application because it is likely that few lot owners would consent to amendment if they understood what the amendment would entail. In light of the provisions for amendment, it is unreasonable to simply give to homeowners' association boards a power that substantially alters the relationship between the parties, and that the homeowners have not chosen to give.

The Court of Appeals' decision in this case, with respect to the Contract Clause issue, departs from the applicable law set forth in *Green v. Biddle* and *Ogden v. Saunders* to such an extent as to call for the exercise of this Court's supervisory power and certification with respect to the Contract Clause issue.

CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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January 9, 2008

APPENDIX A

[Filed Oct. 11, 2007]

No. 445P07 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Reidy v. Whitehart Association)

JOHN P. REIDY and wife, TERRI L. REIDY

v.

WHITEHART ASSOCIATION, INC.

From NC Court of Appeals
(06-1310)
From Wake
(05CVS15227)

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiffs on the 11th day of September 2007 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 11th day of October 2007.

/s/ Hudson, J.
For the Court"

Upon consideration of the petition filed on the 11th day of September 2007 by Plaintiffs in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 11th day of October 2007.

/s/ Hudson, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of October 2007.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

/s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

[SEAL]

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Nelson G. Harris, Attorney at Law, For Reidy
Ms. Hope Derby Carmichael, Attorney at Law, For Whitehart Association

Mr. Brian S. Edlin, Attorney at Law, for Whitehart Asso.
Ms. Jessica E. Cooley, Attorney at Law, for Whitehart Asso.
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

APPENDIX B

JOHN P. REIDY, and wife, Terri L. Reidy,

Plaintiffs,

v.

WHITEHART ASSOCIATION, INC.,

Defendant.

No. COA06-1310.

Court of Appeals of North Carolina.

Aug. 7, 2007.

Background: Property owners brought action against homeowners' association after association imposed a $25 per day fine for owners' violation of architectural committee's decision. The association counterclaimed, seeking to collect the fines. The Superior Court, Wake County, Robert H. Hobgood, J., granted association summary judgment, but denied attorney fees.

Holdings: On cross-appeals, the Court of Appeals, McCullough, Jr., held that:

(1) owners were estopped from contesting the validity of homeowners' association;

(2) association constituted a lot owners' association under the Planned Community Act;

(3) retroactive application of Act's provision that allowed association to impose fines did not violate contract clause of Constitution;

(4) owners' substantive due process rights were not violated;

(5) owners' procedural due process rights were not violated; and

(6) Court of Appeals lacked jurisdiction to hear appeal regarding attorney fee award.

Affirmed.

Appeal by plaintiffs and cross-appeal by defendant from order entered 20 June 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 4 June 2007.

Harris & Hilton, P.A., by Nelson G. Harris, Raleigh, for plaintiff appellants.

Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr., Brian S. Edlin and Jessica E. Cooley, Raleigh, for defendant appellee, cross-appellant.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendant's motion for summary judgment and mandatory injunction and order denying plaintiffs' motion for summary judgment. Defendant cross-appeals from the same order because the trial court did not award reasonable attorneys' fees to defendant. We affirm.

FACTS

John P. Reidy, and wife, Terri L. Reidy ("plaintiffs") obtained title to Lot 54 in the Whitehart Subdivision ("the Lot") by deed recorded on 16 July 1999. On or about 28 February 2005, plaintiff John Reidy requested design approval from the Whitehart Architectural Committee for a structural addition to his property. Specifi-

cally, he wanted to add a door and staircase to the rear exterior of his detached garage in order to provide access to the upstairs storage area above his garage. On 3 March 2005, the Architectural Committee denied Mr. Reidy's request because the addition would not be consistent with the aesthetics of the neighborhood. Despite the Committee's decision, plaintiffs commenced construction of the staircase on the rear of their detached garage in or about August of 2005.

In response to plaintiffs' disregard of the Architectural Committee's decision, Whitehart Association, Inc. ("the Association") sent plaintiffs a letter on 31 August 2005 inviting them to attend a hearing. Plaintiffs appeared on 27 October 2005 before the Board of the Association. The Board voted to impose a fine in the amount of $25.00 per day commencing on 1 November 2005 for plaintiffs' violation.

On 31 October 2005, plaintiffs filed a complaint against the Association. On 21 December 2005, the Association served its answer, motions to dismiss, motion for judgment on the pleadings, affirmative defenses and counterclaim on plaintiffs. The counterclaim sought, in part, to collect the fines which were secured by a claim of lien. On 3 January 2006, plaintiffs filed their response to the Association's counterclaim and affirmative defenses.

On 12 December 2005, plaintiffs filed a motion for summary judgment as to all but one of the counts included in their complaint. On 27 January 2006, the Association filed its cross motion for summary judgment on all counts contained in defendant's counterclaim and all counts contained in plaintiffs' complaint.

On 24 February 2006, the trial court entered an order granting the Association's cross motion for summary judgment on counts 1, 2, 3, 5, 6, and 7 of plaintiffs' complaint. In addition, the trial court denied plaintiffs' motion for summary judgment as to counts 1, 2, 3, 5, 6, and 7 of plaintiffs' complaint. The trial court continued the hearing on count 4 of plaintiffs' complaint and counts 1 and 2 of the Association's counterclaim.

The plaintiffs filed a motion for summary judgment as to count 4 of their complaint and counts 1 and 2 of defendant's counterclaim. On 20 June 2006, the trial court entered an order granting the Association's cross motion for summary judgment as to count 4 of plaintiffs' complaint. The trial court granted the Association's cross motion for summary judgment as to counts 1 and 2 of its counterclaim requiring removal of the staircase and door and entering judgment for the fines accrued through the date of the hearing.

Plaintiffs appeal the trial court's order entered 20 June 2006. The Association cross appeals the failure of the trial court to award reasonable attorneys' fees.

ANALYSIS

All of plaintiffs' contentions on appeal contest the trial court's granting of summary judgment in favor of the Association; so the following standard of review applies. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen.Stat. § 1A-1, Rule 56(c) (2005). "There is no genuine issue of material

fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675, *disc. review denied*, 361 N.C. 166, 639 S.E.2d 649 (2006). On appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999).

I — The Association

Plaintiffs contend the trial court erred in granting summary judgment in favor of the Association on the basis that (1) the Association was improperly formed, and (2) the membership of the Association conflicted with the allowed membership as defined in the Declaration of Covenants, Conditions and Restrictions ("the Declaration"). We disagree.

"Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881-82 (2004). Plaintiffs obtained title to the lot on or about 16 July 1999, and they conceded in their response to the counterclaim of the Association that they purchased the lot subject to the Declaration. Nothing in the record illustrates that plaintiffs have contested the validity of the Association between 8 December 2000, the date the Association filed its Articles of Incorporation, and 3 March 2005, the date on which the Architectural Committee

denied plaintiffs' request. However, there is some evidence in the record that plaintiffs recognized the validity of the Association. For example, based on the accounting records of the management company for Whitehart, plaintiffs have paid their annual assessments consistently since January 2001. In addition, plaintiffs requested design approval from the Architectural Committee for the structural addition. There is also evidence that plaintiff Terry Reidy called the property manager of Whitehart on or about May of 2005 and complained about a neighbor damaging common property. In response to plaintiff Terry Reidy's complaint, the property manager sent a letter to the neighbor stating that complaints have been received regarding the damage to common property, and that any damage must be fully restored to the prior condition.

Thereford, plaintiffs are estopped from contesting the validity of the Association.

II — Planned Community Act

Several of plaintiffs' arguments on appeal concern the Planned Community Act ("the Act") which is found in Chapter 47F of the North Carolina General Statutes. The Act is instrumental to the instant case because it provides a basis for the Association to fine plaintiffs. *See* N.C. Gen.Stat. §47F-3-102(12) (2005). Plaintiffs argue that the Act has no application to this case because the Association is not an association within the meaning of the Act. In addition, plaintiffs argue that applying the Act to the instant case violates the contracts clause, substantive due process, and procedural due process. North Carolina law is clear that there is a presumption in favor of the constitutionality of a legis-

latively enacted statute. *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 632-33 (1968), *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1969). Unless a statute "clearly, positively and unmistakably appears" to be unconstitutional, then statutes are to be upheld. *Id.* at 350, 164 S.E.2d at 633.

A. The Act's Application To the Instant Case

Plaintiffs contend that the Act has no application to this case because the Association is not a lot owners' association under the Act. We disagree.

Plaintiffs argue the Association was incorporated after the conveyance of the first lot in violation of N.C. Gen. Stat. § 47F-3-101 (2005) which requires a "lot owners' association" to be incorporated no later than the date the first lot in the planned community is conveyed. *Id.* However, the official comment of the original version of the Act provided that the "Act is effective January 1, 1999 and applies in its entirety to all planned communities created on or after that date except as provided. . .," and N.C. Gen.Stat. § 47F-3-101 was not one of the provisions that was noted to be applicable to pre-1 January 1999 communities. N.C. Gen.Stat. § 47F-1-102 (Official Comment) (1999). Subsequently, this portion of the official comment was implemented into the actual language of the statute. N.C. Gen.Stat. § 47F-1-102 (2005). Accordingly, we disagree with plaintiffs.

B. Contract Clause

Next, plaintiffs contend the trial court erred in granting summary judgment in favor of the Association because retroactive application of N.C. Gen.Stat. § 47F-

3-102(12) and N.C. Gen.Stat. § 47F-3-107.1 (2005), as provided for by N.C. Gen.Stat. § 47F-1-102(c), violates the contract clause of the United States Constitution. We disagree.

N.C. Gen.Stat. § 47F-3-102(12) allows a homeowners' association to impose reasonable fines or suspend privileges or services provided by the association for reasonable periods for violations of the declaration, by-laws, and rules and regulations of the association. *Id.* N.C. Gen.Stat. § 47F-3-107.1 concerns, among other things, the procedures a homeowners accotiation must follow when fining a homeowner pursuant to N.C. Gen.Stat. § 47F-3-102(12). N.C. Gen.Stat. § 47F-3-107.1. Further, N.C. Gen.Stat. § 47F-1-102(c) creates a presumption that both N.C. Gen.Stat. § 47F-3-102(12) and N.C. Gen.Stat. § 47F-3-107.1 applies to all planned communities created in North Carolina before 1 January 1999. N.C. Gen.Stat. § 47F-1-102(c). Plaintiffs argue that retroactive application of the above-referenced statutes substantially changes the contract between the parties, in violation of the contract clause.

"Any law which enlarges, abridges or changes the intention of the parties as indicated by the provisions of a contract necessarily impairs the contract whether the law professes to apply to obligations of the contract or to regulate the remedy for enforcement of the contract." *Adair v. Orrell's Mut. Burial Assoc.*, 284 N.C. 534, 538, 201 S.E.2d 905, 908, *appeal dismissed*, 417 U.S. 927, 94 S.Ct. 2637, 41 L.Ed.2d 231 (1974). However, in *Tabor v. Ward*, 83 N.C. 291, 294-95 (1880), the North Carolina Supreme Court stated:

> It is well settled by a long current of judicial decisions, state and federal, that the legislature of a state may at any time modify the remedy, even take away a common law remedy altogether, without

> substituting any in its place, if another efficient remedy remains, without impairing the obligation of the contract.

Here, the provision of the Act does not disturb a vested right, impair a binding contract or create a new obligation. The provision merely provides an additional remedy for the enforcement of the Declaration. *See Byrd v. Johnson*, 220 N.C. 184, 188, 16 S.E.2d 843, 846 (1941) (" 'Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts.' "). In addition, the Act facilitates the intent of the parties by solidifying the importance of the restrictive covenants. *Bateman v. Sterrett*, 201 N.C. 59, 62, 159 S.E. 14, 16 (1931) ("[A] statute which facilitates the intention of the parties neither impairs the obligation of the contract, nor divests vested rights."). Accordingly, we disagree with plaintiffs.

C. Substantive Due Process

Plaintiffs contend the trial court erred in granting summary judgment in favor of the Association because retroactive application of N.C. Gen.Stat. § 47F-3-102(12) and N.C. Gen.Stat. § 47F-3-107.1, as provided for by N.C. Gen.Stat. § 47F-1-102(c), violates plaintiffs' substantive due process rights under the United States Constitution and the North Carolina "law of the land" provision. We disagree.

"When confronted with a challenge to a validly adopted statute, the courts must assume that the General Assembly acted within its constitutional limits unless the contrary clearly appears." *Shipman v. N.C. Private Pro-*

tective Services 3d., 82 N.C.App. 441, 443, 346 S.E.2d 295, 296, *appeal dismissed, disc. review denied*, 318 N.C. 509, 349 S.E.2d 866 (1986). "For a statute to be within the limits set by the federal due process clause and the North Carolina 'law of the land' provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose." *Id.*

The Act does not violate plaintiffs' substantive due process rights. A legitimate purpose of the Act is to provide a statutory framework for dealing with modern real estate developments, particularly, planned communities. In addition, the individual statutes that form the Act are rationally related to this purpose. Accordingly, we disagree with plaintiffs.

D. Procedural Due Process

Plaintiffs contend with procedure provided by the Association violated plaintiffs' procedural due process rights under both the Fourteenth Amendment and the North Carolina "law of the land" provision. We disagree.

Our Supreme Court has stated that the "mandate of procedural due process contained in our Constitution and in the Fourteenth Amendment applies only to actions by the government which deprive individuals of their fundamental rights." *North Carolina National Bank v. Burnette*, 297 N.C. 524, 534, 256 S.E.2d 388, 394 (1979). Procedural due process, as guaranteed by the Fourteenth Amendment " 'restricts governmental actions and decisions which ["]deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." ' "

Clayton v. Branson, 170 N.C.App. 438, 452, 613 S.E.2d 259, 270, *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005). In addition, the North Carolina Supreme Court has noted that under the Fourteenth Amendment, "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998). "Our state courts generally treat the corresponding section of the N.C. Constitution as the functional equivalent of its federal counterpart." *Clayton*, 170 N.C.App. at 451, 613 S.E.2d at 269.

Here, the procedure provided by the Association did not violate plaintiffs' procedural due process rights. First, we question whether the creation of the statutory framework by the legislature constitutes "state action" for procedural due process purposes. *See Giles v. First Virginia Credit Servs., Inc.*, 149 N.C.App. 89, 104-05, 560 S.E.2d 557, 567 (2002) (determining that the statutory scheme providing for non-judicial repossession of collateral did not constitute state action sufficient to evoke the protection of the due process clause of the Fourteenth Amendment of the United States Constitution). Next, even if the creation of the statutory framework is sufficient state action, the Association did not violate plaintiffs' procedural due process rights. Pursuant to N.C. Gen.Stat. § 47F-3-107.1, "the lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision." *Id.* Thus, the Act comports with procedural due process requirements. Furthermore, the Association provided plaintiffs with notice of the charge, opportunity to be heard at a meeting, opportunity to

present evidence and notice of the decision. Accordingly, we disagree with plaintiffs.

III — Conduct of the Association

Plaintiffs' final two contentions concern the conduct of the Association. First, plaintiffs contend the Association's conduct of the hearing violated any contract between the parties. Next, plaintiffs contend that genuine issues of material fact exist as to whether the Association discriminated against plaintiffs in enforcement of the Declaration. We disagree.

Regarding the issue of the conduct of the hearing, plaintiffs' brief contains no citation to any legal authority, and thus will be taken as abandoned. N.C. R.App. P. 28(b)(6). Regarding the contention that genuine issues of material fact exist as to whether the Association discriminated against plaintiffs, plaintiffs have admitted to having erected their staircase and door without the Architectural Committee's approval, and did so in the face of disapproval. Moreover, there does not appear to be any evidence of discrimination on the part of the Association. Accordingly, we disagree with plaintiffs.

IV — Attorney's Fees

The Association contends the trial court erred in failing to award reasonable attorneys' fees pursuant to N.C. Gen.Stat. §47F-3-116(e) (2005). We disagree.

Rule 3(a) of the North Carolina Rules of Appellate Procedure provides as follows:

> Any party entitled by law to appeal from a judgment or order of a superior or district court ren-

> dered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

N.C. R.App. P. 3(a). Here, the Association filed its "Cross Notice of Appeal" with the Clerk of the Court of Appeals, not with the Clerk of Superior Court of Wake County. "The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements . . . are met, the appeal must be dismissed." *Smith v. Smith*, 43 N.C.App. 338, 339, 258 S.E.2d 833, 835 (1979), *disc. review denied*, 299 N.C. 122, 262 S.E.2d 6 (1980). Although the Association states in its brief that the "Cross Notice of Appeal is on file with the trial court . . . and was in the file with the trial court when counsel for [the Association] reviewed the court file," no cross notice of appeal is in the record that was filed with the trial court in order to give us jurisdiction. *See Blevins v. Town of West Jefferson*, ___ N.C.App. ___ , ___ , 643 S.E.2d 465, 467 (2007) (" 'Without proper notice of appeal, this Court acquires no jurisdiction.' "). (citation omitted). Accordingly, we dismiss the Association's cross-appeal.

Affirmed.

Chief Judge MARTIN and Judge TYSON concur.

APPENDIX C

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

05 CVS 15227

JOHN P. REIDY, and wife,
TERRI L. REIDY,

Plaintiffs,

v.

WHITEHART ASSOCIATION, INC.,

Defendant.

ORDER GRANTING WHITEHART'S MOTION FOR SUMMARY JUDGMENT AND MANDATORY INJUNCTION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard during the June 1, 2006 session of Wake County Superior Court before the undersigned Superior Court Judge presiding, on the Motion for Summary Judgment as to Count 4 of Plaintiff's Complaint, on the Motion for Summary Judgment filed by Defendant Whitehart Association, Inc. with respect to Counts 1 and 2 of Whitehart's Counterclaim

and on the Plaintiff's Motion for Summary Judgment with respect to Counts 1 and 2 of Whitehart's Counterclaim and Count 4 of Plaintiff's Complaint. Plaintiffs were represented by Nelson G. Harris, Esq. of the Raleigh, North Carolina law firm of Harris & Hilton, P.A. Defendant Whitehart Association, Inc. ("Whitehart") was represented by Brian S. Edlin, Esq. of the Raleigh, North Carolina law firm of Jordan, Price, Wall, Gray, Jones & Carlton, PLLC.

Having reviewed the pleadings, exhibits to pleadings, public records identified in the pleadings and motions, affidavits, discovery and having listened to arguments of counsel;

It appears to the Court that there is no genuine issue of material fact and that Whitehart is entitled to judgment as a matter of law in its favor with respect to Count 4 of the Plaintiffs' Complaint and Counts 1 and 2 of Whitehart's Counterclaim.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Whitehart's Motion for Summary Judgment is granted in favor of Whitehart on Count 4 of the Plaintiffs' Complaint and Plaintiff's Count 4 is hereby dismissed with prejudice.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment as to Count 4 of Plaintiffs' Complaint and Counts 1 and 2 of Whitehart's Counterclaim is denied.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Whitehart's Motion for Summary Judgment on Counts 1 and 2 of Whitehart's Counterclaim is granted. The Plaintiffs are hereby ordered to remove, within 60 days of this Order, the staircase and the door attached to the rear of the detached garage on the Plain-

tiff's Lot. The Plaintiffs are further ordered to, within 90 days of this Order, return the home on their Lot to its original condition as it existed immediately before erection of the unapproved door and detached stairs on the detached garage on the Lot.

IT IS FURTHER ORDERED ADJUDGED AND DECREED, that Whitehart is entitled to recover $25.00 per day beginning on 1 November 2005 and continuing through June 1, 2006, the date of hearing in this matter. As of 1 June 2006, the total fines which had accrued was $5,325 (213 days x $25 = $5,325). As of the date of the hearing, Whitehart is entitled to have and recover of the Plaintiffs as judgment the sum of $5,325, representing fines accrued through 1 June 2006. This Order is without prejudice for Whitehart to re-apply to the Court for enforcement of future fines to the extent such continue to accrue as a result of the Plaintiffs failure to Comply with this Order as set forth above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that this matter is reserved for further orders of the Court to ensure compliance with the terms of the mandatory injunction set forth above.

So ordered this the 19th day of June, 2006, at 5:45 P.M.

/s/ Robert H. Hobgood
Superior Court Judge Presiding

APPENDIX D

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

05 CVS 15227

JOHN P. REIDY, and wife,
TERRI L. REIDY,

Plaintiffs,

v.

WHITEHART ASSOCIATION, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ORDER GRANTING CONTINUANCE

THIS CAUSE came on to be heard during the February 13, 2006 session of Wake County Superior Court before the undersigned Superior Court Judge presiding, on the Motion for Summary Judgment as to Counts 1,

2, 3, 5, 6, and 7 of Plaintiff's Complaint, on the Cross Motion for Summary Judgment filed by Defendant Whitehart Association, Inc., and on Plaintiff's Motion to Continue Whitehart's Motion for Summary Judgment on Count 4 of the Plaintiff's Complaint and Counts 1 and 2 of Whitehart's Counterclaim. Plaintiffs were represented by Nelson G. Harris, Esq. of the Raleigh, North Carolina law firm of Harris & Hilton, P.A. Defendant Whitehart Association, Inc. ("Whitehart") was represented by Henry W. Jones, Jr., Esq. and Brian S. Edlin, Esq. of the Raleigh, North Carolina law firm of Jordan, Price, Wall, Gray, Jones & Carlton, PLLC.

Having reviewed the pleadings, exhibits to pleadings, affidavits, and having listened to arguments of counsel;

It appears to the Court that there is no genuine issue of material fact and that Whitehart is entitled to judgment as a matter of law in its favor with respect to Counts 1, 2, 3, 5, 6 and 7 of the Plaintiffs' Complaint. It also appears to the Court that Plaintiff's Motion to Continue Whitehart's Motion for Summary Judgment on Count 4 of the Plaintiff's Complaint and Counts 1 and 2 of Whitehart's Counterclaim should be granted.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Whitehart's Cross Motion for Summary Judgment is granted in favor of Whitehart on Counts 1, 2, 3, 5, 6, and 7 of the Plaintiffs' Complaint.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment as to Counts 1, 2, 3, 5, 6 and 7 of Plaintiffs' Complaint is denied.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that hearing on Whitehart's Motion for Summary Judgment on Count 4 of the Plaintiff's Complaint

and Counts 1 and 2 of Whitehart's Counterclaim is continued from the 13 February 2006 session.

So ordered this the 27th day of February, 2006, at 5:24 P.M.

/s/ Robert H. Hobgood
Superior Court Judge Presiding

APPENDIX E

[Filed December 9, 2005]

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 05 CVS 15227

JOHN P. REIDY and TERRI L. REIDY,
Plaintiffs

v.

WHITEHART ASSOCIATION, INC.,
Defendant

AFFIDAVIT OF JOHN P. REIDY

John P. Reidy, being first and duly sworn, deposes and says the following:

1. Plaintiff John P. Reidy is a citizen and resident of Wake County, North Carolina, and is neither a minor nor an incompetent person.

2. Plaintiff Terri L. Reidy is a citizen and resident of Wake County, North Carolina, and is neither a minor nor an incompetent person.

3. I am informed and believe that Defendant Whitehart Association, Inc. is a corporation, organized and existing under the laws of the State of North Carolina, with an office and principal place of business in Wake County, North Carolina. Defendant was formed on December 8, 2000.

4. Plaintiffs are the owners of real property in Wake County, North Carolina, commonly known as 3009 Whitehart Lane, Raleigh, NC 27606 ("the Property"), and being described more particularly as follows:

> Being all of Lot 54 Whitehart Subdivision, as shown in Book of Maps 1998, Page 1010, Wake County Registry, to which reference is hereby made for greater certainty of description.

5. Plaintiffs received title to the property pursuant to the terms of a North Carolina General Warranty Deed recorded in Book 8363, Page 1391, Wake County Registry. A true and accurate copy of the North Carolina General Warranty Deed is attached to Plaintiffs' Complaint as Exhibit 1 and fully incorporated herein by reference.

6. On October 2, 1997, Whitehart Limited Partnership, a North Carolina limited partnership recorded, at Book 7686, Page 367 of the Wake County Registry, a certain Declaration of Covenants, Conditions and Restrictions Whitehart Subdivision Book of Maps 1997 Page 1645 ("the Declaration"). A true and accurate copy of the Declaration is attached to Plaintiffs' Complaint as Exhibit 2 and fully incorporated herein by reference.

7. I am informed and believe that Defendant is a homeowners association formed subsequent to recording of the Declaration, but which holds itself out as the "Whitehart Association" described in the Declaration.

8. I am informed and believe that Defendant contends that Plaintiffs took the Property subject to the terms of the Declaration, and are bound by its terms.

9. The Declaration contains no authority for the imposition of fines for violations of the Declaration, nor has there been any amendment or modification of the Declaration to authorize the imposition of fines for violations of the Declaration.

10. On or about August 31, 2005, Plaintiffs received a letter from Frank Terhaar-Yonkers, President of Defendant, concerning alleged violations, by Plaintiffs, of the Declaration ("the August 31, 2005 letter"). A true and accurate copy of the August 31, 2005 letter is attached to Plaintiffs' Complaint as Exhibit 3 and fully incorporated herein by reference.

11. Pursuant to the terms of the August 31, 2005 Letter, Plaintiffs were give notice that Defendant had instituted a fine policy for "violations of the Association's legal documents," and that "a fine of $25.00 per day has been proposed against you for every day" that alleged violations of the "Whitehart covenants" existed.

12. Pursuant to the terms of the August 31, 2005 Letter, Plaintiffs were given the opportunity to be present at a meeting of the Board of Defendant to "give reason, if any, why this fine should not be levied against you."

13. On October 27, 2005, a meeting of the Board of Defendant was held as provided for in the August 31, 2005 Letter ("the Meeting").

14. At the Meeting, no evidence whatsoever was presented by anyone concerning any alleged violations of the Declaration by Plaintiffs. Plaintiffs did not have the

opportunity to listen to evidence concerning any alleged violations of the Declaration, to cross examine witnesses concerning any alleged violations, or to raise any defenses with respect to their alleged liability.

15. At the Meeting, Plaintiffs were only given the opportunity to make a presentation with respect to the punishment to be imposed on Plaintiffs for violations of the Declaration that Defendant had already prejudged that Plaintiffs had committed. Plaintiffs, through counsel, argued that Defendant could not prejudge Plaintiffs liability concerning alleged violations of the Declaration, that Defendant had to put on evidence of the alleged violations and give Plaintiffs the opportunity to cross examine witnesses and present their own evidence concerning liability if Defendant presented any evidence. Plaintiffs, through counsel, further argued that Defendant lacked the power to impose fines.

16. At the Meeting, Plaintiffs did not concede any violations of the Declaration, and Plaintiffs contend that there is no violation of the Declaration.

17. At the conclusion of Plaintiffs arguments and the Meeting, Plaintiffs were dismissed and left the house where the meeting was held, and the Board continued with its business.

18. On October 28, 2005, Frank Terhaar-Yonkers, President of Defendant, sent a letter to Plaintiffs informing them of Defendant's decision ("the Decision"), which was that a fine in some unspecified amount would be imposed effective immediately. A true and accurate copy of the Decision is attached to Plaintiffs' Complaint as Exhibit 4 and fully incorporated herein by reference.

FURTHER AFFIANT SAYETH NOT.

/s/ John P. Reidy
John P. Reidy

Sworn to and subscribed before me
this the 9 day of December, 2005.

/s/ Marguerite V. Denton
Notary Public

My commission expires: 1/18/2009

WHITEHART SUBDIVISION BOARD OF DIRECTORS
8/31/2005

John & Terri Reidy
3009 Whitehart Lane

Dear Mr. & Mrs. Reidy,

This letter is to inform you that the Whitehart Architectural Committee and Whitehart Board of Directors have received a complaint that you are in violation of the Whitehart covenants.

You recently petitioned the Architectural Committee for changes to your property, some of which were approved, some of which were denied. In contempt of the ARC committee and the Whitehart covenants, you have proceeded to construct the back stairway and pad anyway that were specifically denied.

Our Homeowners Association has the authority, under the new North Carolina Planned Community Act (Chapter 47E of the North Carolina General Statutes), to levy fines for covenant violations (G.S. § 47E-3-102(12). Under the Act, those fines become a part of

the assessment lien against the lot in question, and that lien can be sued upon or foreclosed just as the lien for assessments.

Pursuant to the above, law, the Board of Directors has instituted a fine policy for violations of the Association's legal documents, and a fine of $25.00 per day has been proposed against you for every day that this violation exists. Please be aware that this fine will become a lien against your property and may be foreclosed pursuant to Chapter 47E of the North Carolina General Statutes.

The Board will hold a hearing on Thursday October 27, 7:00pm at the Whitehart Pool, for you to be present and give reason, if any, why this fine should not be levied against you. Your failure to appear will result in the fine beginning to accrue on the day after the hearing.

Of course, if your property is brought back into compliance with the Declaration prior to that date, no hearing will be necessary.

Thank you for your immediate attention to this matter.

Sincerely; /s/ F T-Y

Frank Terhaar-Yonkers [EXHIBIT 3]
President Board of Directors
919-661-9086

Fty/
Cc: Nancy Tidwell, PPM Inc.
Cc: BoD, Whitehart
Cc: ARC, Whitehart

APPENDIX F

[SEAL]

STATE OF NORTH CAROLINA

GENERAL STATUTES COMMISSION
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: June 6, 2004

RE: Senate Bill 1167 (Condo and Planned Comm. Clarifications)

General Comments

This bill makes essentially the same amendments to the North Carolina Condominium Act (Condominium Act) and the North Carolina Planned Community Act (Planned Community Act) (respectively Chapter 47C and Chapter 47F of the General Statutes). Among other things, these Acts give condominium and homeowners associations various listed powers, many of which apply to condominiums and planned communities that predate the Acts. This bill amends these Acts to specify that the statute in each Act that contains the list of powers:

(1) applies in the same manner to all condominiums or planned communities, regardless of the time they were created, and

(2) applies unless the organizational documents for the condominium or planned community expressly provide to the contrary.

The General Assembly enacted the Planned Community Act in 1998 (in SL 1998-199). The enacting session law explicitly provides that portions of the Act, including G.S. 47F-3-102(12) (Powers of owners' associations to impose reasonable fines for violations of the declarations, bylaws, or rules and regulations of the association), apply to pre-existing planned communities. In 2003, the North Carolina Supreme Court considered the application of subdivision (12) to a pre-existing planned community in *Wise v. Harrington Grove Homeowners Association*, 357 N.C. 396, ___ S.E.2d ___ (2003). The Court construed the introductory language of G.S. 47F-3 102, that a homeowners' association has the powers listed in that statute "[s]ubject to the provisions of the articles of incorporation or the declaration . . .", as meaning "if the organizational documents are amended to grant the power" if the planned community was pre-existing. However, applied to homeowners' associations created after the effective date of the Planned Community Act, the Court continued, "subject to" means "unless the organizational documents prohibit or limit the power."

The Court's opinion appears to be contrary to the drafter's intent. The phrase "subject to" was intended to mean "unless the organizational documents prohibit or limit the power" when applied to both pre- and post-existing planned communities, according to the Official Comment to the equivalent section of the Uniform Planned Community Act, on which G.S. 47F-3-102 is based. The Uniform Act's Official Comment is not printed in the General Statutes and was not brought to the Court's attention before it issued its opinion in *Wise* and the enacting session law's applicability language was not codified with the original legislation.

The matter was brought to the General Statutes Commission's attention by the original members of the committee that drafted the Planned Community Act. They noted that *Wise* may also affect the Condominium Act (Chapter 47C of the General Statutes), which has similar language and was also a model for the Planned Community Act.

Specific Comments

Sections 1 and 3. These sections amend the applicability sections of the Condominium Act and the Planned Community Act, respectively G.S. 47C-1-102 and G.S. 47F-1-102, to specify that the portions applicable to pre-existing condominiums or planned communities apply unless the organizational documents expressly provide to the contrary.

Sections 2 and 4. These sections amend the statutes listing powers of condominium and homeowners' associations (respectively G.S. 47C-3-102 and G.S. 47F-3-102) to change the current "subject to" language to "unless [the organizational documents] expressly provide to the contrary."

Section 5. This section makes the bill effective when it becomes law.

APPENDIX G

SELECTED PROVISIONS FROM THE NORTH CAROLINA PLANNED COMMUNITY ACT

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§ 47F-1-102. Applicability

(a) This Chapter applies to all planned communities created within this State on or after January 1, 1999, except as otherwise provided in this section.

(b) This Chapter does not apply to a planned community created within this State on or after January 1, 1999:

(1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or

(2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

(c) Notwithstanding the provisions of subsection (a) of this section, G. S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-103(f) (Executive board members and officers), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-107.1 (Procedures for fines and suspension of planned community privileges or services), G.S. 47F-3-108 (Meetings), G.S. 47F-3-115 (Assessments for com-

mon expenses), G.S. 47F-3-116 (Lien for assessments), G.S. 47F-3-118 (Association records), and G.S. 47F-3-121 (American and State flags and political sign displays) apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the contrary, and G.S. 47F-3-120 (Declaration limits on attorneys' fees) applies to all planned communities created in this State before January 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

(d) Notwithstanding the provisions of subsections (a) and (c) of this section, any planned community created prior to January 1, 1999, may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

(e) This Chapter does not apply to planned communities or lots located outside this State.

Added by S.L. 1998-199, § 1. eff. Jan. 1, 1999. Amended by S.L. 2002-112, § 2, eff. Sept. 6, 2002; S.L. 2004-109, § 3, eff. July 17, 2004; S.L. 2005-214, § 1, eff. July 20, 2005; S.L. 2005-422, § 9, eff. Jan. 1, 2006; S.L. 2006-226, § 15(a), eff. Aug. 10, 2006.

Historical and Statutory Notes

2002 Legislation

S.L. 2002-112, § 2, eff. Sept. 6, 2002, rewrote the section, which prior thereto read:

"(a) This Chapter applies to all planned communities within this State except as provided in subsection (b) of this section.

"(b) This Chapter does not apply to a planned community created within this State:

"(1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or

"(2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

"(c) This Chapter does not apply to planned communities or lots located outside this State.

"(d) Any planned community created prior to the effective date of this Chapter may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment

may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) percent of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community."

2004 Legislation

S.L. 2004-109, § 3, eff. July 17, 2004, in the first sentence of subsec. (c), inserted ", unless the articles of incorporation or the declaration expressly provides to the contrary".

2005 Legislation

S.L. 2005-214, § 1, eff. July 20, 2005, in the first sentence of subsec. (c), added ", and G.S. 47F-3-120 (Declaration limits on attorneys' fees) applies to all planned communities created in this State before January 1, 1999".

S.L. 2005-214, § 2, provides:

"This act is effective when it becomes law and applies to actions commenced on or after that date."

S.L. 2005-422, § 9, eff. Jan. 1, 2006, amended subsec. (c) by inserting "G.S. 47F-3-103(f) (Executive board members and officers),", "G.S. 47F-3-107.1 (Procedures for fines and suspension of planned community privileges or services), G.S. 47F-3-108 (Meetings),", "G.S. 47F-3-118 (Association records), and G.S. 47C-3-121 (American and State flags and political sign displays)", and deleted "and" after "(Assessments for common expenses,".

S.L. 2005-422, § 20, provides:

"This act becomes effective January 1, 2006, and applies to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date."

2006 Legislation

S.L. 2006-226, § 15(a) eff. Aug. 10, 2006, amended subsec. (c) by substituting "G.S. 47F-3-121" for "G.S. 47C-3-121".

S.L. 2006-226, § 34, provides:

"Sections 1, 2, 3, 4, 5, 6, and 7 of this act become effective January 1, 2007. The remainder of this act is effective when it becomes law."

§47F-3-102. Powers of owners' association

Unless the articles of incorporation or the declaration expressly provides to the contrary, the association may:

* * *

(12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association;

* * *

Added by S.L. 1998-199, § 1. eff. Jan. 1, 1999. Amended by S.L. 2004-109, § 4, eff. July 17, 2004; S.L. 2005-422, § 1, eff. Jan. 1, 2006.

Historical and Statutory Notes

S.L. 1998-199, § 3, provides:

"This act becomes effective January 1, 1999." [Amended by S.L. 2002-112, § 3, eff. Sept. 6, 2002.]

2004 Legislation

S.L. 2004-109, § 4, eff. July 17, 2004, in the introductory clause, substituted "Unless the articles of incorporation or the declaration expressly provides to the contrary" for "Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein".

§47F-3-107.1. Procedures for fines and suspension of planned community privileges or services.

Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred dollars ($100.00) may be imposed for the violation and without further hearing, for each day more than five days after the decision that the violation occurs. Such fines shall be assessments secured by liens under G.S. 47F-3-116. If it is decided that a suspension of planned community privileges or services should be imposed, the suspension may be continued without further hearing until the violation or delinquency is cured. The lot owner may appeal the decision of an adjudicatory panel to the full executive board by delivering written notice of appeal to the executive board within 15 days after the date of the decision. The executive board may affirm, vacate, or modify the prior decision of the adjudicatory body.

Added by S.L. 1998-199, § 1. eff. Jan. 1, 1999. Amended by S.L. 2005-422, § 4, eff. Jan. 1, 2006.

APPENDIX H

UNIFORM PLANNED COMMUNITY ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR
ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
IN KAUAI, HAWAII
JULY 26 – AUGUST 1, 1980

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Houston, Texas, February 9, 1981

* * *

ARTICLE 3
MANAGEMENT OF PLANNED COMMUNITY

* * *

§ 3-102. [Powers of Unit Owners' Association]

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:

* * *

(11) impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association;

* * *

Comment

* * *

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the planned community. These powers are intended to be in addition to any rights which the association may have under other law.

* * *